

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMAL LACEY,

Defendant-Appellant.

UNPUBLISHED

July 9, 1999

No. 207690

Kent Circuit Court

LC No. 96-013712 FC

Before: Hoekstra, P. J., and Saad and R. B. Burns*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with a dangerous weapon, MCL 750.82; MSA 28.277, and third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to five to eight years' imprisonment for the assault conviction and twenty to thirty years' imprisonment for the criminal sexual conduct conviction. He appeals. We affirm.

Defendant was originally charged with assault with intent to murder, MCL 750.83; MSA 28.278, and third-degree criminal sexual conduct. Defendant picked up his victim, a fifteen-year-old prostitute, at about 4:30 in the morning and made a deal for her services. After engaging in both oral and vaginal sex inside defendant's van, defendant strangled the victim with an electrical cord, telling her as he choked her that she was "a cheap whore," and that "she shouldn't have rushed him." The victim was choked to the point of unconsciousness. When she awoke some time later, defendant was calm. He then drove with her to a nearby gas station where he entered to purchase cigarettes. The victim escaped from the van and called the police, who arrived immediately and arrested defendant.

At trial, defendant conceded that he had sexually penetrated the victim, contesting neither this element nor the fact that she was not of consensual age. Defendant's only argument against his conviction on this charge was that the criminal sexual conduct statutes were not intended to protect prostitutes. Arguing against conviction of assault with intent to murder, defendant conceded placing an electrical cord around the victim's neck, but contended that he had merely restrained her with minimal

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

pressure when she attempted to leave his van after having stolen his money. Photographs taken shortly after defendant's arrest, however, as the victim gave police a statement, demonstrated significant redness about her neck. A forensic pathologist testified that these photos depicted not only the marking that would be made by an electrical cord, but also scratches consist with the victim's testimony that she tried to pull the cord away from her neck in an effort to get air.

I

Defendant's primary appellate contention is that the trial court erroneously admitted evidence under MRE 404(b). This evidence of other acts came from three witnesses, one a former girlfriend, but all prostitutes, who testified that defendant had similarly strangled them in situations related in varying degrees to sexual contact. Defendant contends that without this evidence the jury would have returned a verdict of not guilty on the assault charge. We disagree.

Our review of the proceedings convinces us that there was no abuse of discretion in the admission of this evidence. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). The rule of evidence at issue provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

In *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), the Supreme Court detailed three requirements for introduction of other acts. To be admissible, the evidence must be proffered for a proper purpose under MRE 404(b); it must be relevant, under MRE 402 as enforced through MRE 104(b), to an issue of fact or consequence; and it must pass the balancing test of MRE 403. *Id.* at 74-75. The Court also made clear that admission is only prohibited under Rule 404(b) when the sole purpose is to show an individual's propensity for a particular action based on character inferred by other acts. *Id.* at 65.

We find the evidence was proffered for a proper purpose under MRE 404(b), to show defendant's "motive" and "scheme, plan or system of doing an act." MRE 404(b)(1). The testimony revealed that defendant choked each of the women, that he made similar accusations of being "rushed," and that his sexual arousal was muted before but enhanced after he choked them. This evidence demonstrated a signature method of strangulation by ligature and a signature trigger of sexual dysfunction or dissatisfaction. Properly proffered under Rule 404(b), any inference to defendant's conduct or criminal propensity was secondary and unavoidable. Moreover, the court appropriately provided a limiting instruction, directing the jury to consider the evidence only with regard to whether it tended to show that defendant was using a particular scheme or characteristic. *Id.* at 75.

Next, we find that the other acts evidence was relevant to an issue of fact or consequence. MRE 401. Defendant claimed that he had not choked the victim with an intent to cause serious harm, but instead had done so in an attempt, mistakenly thought justifiable, to scare her into returning the money he alleged she was stealing. Evidence suggesting a different motive was relevant. The prosecutor's introduction of these other acts, all occurring in situations related to sexual activity, tended to make more probable his argument that defendant choked the victim for a different and more malevolent purpose than the alleged attempt to merely scare her and prevent her from stealing. See *Crawford, supra*, at 392-393.

Finally, we find that defendant was not unfairly prejudiced by the introduction of the other acts evidence. MRE 403. Evidence presented by the prosecutor is expected to be prejudicial, and Rule 403 prohibits only evidence that is unfairly so. *Crawford, supra* at 398. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Id.* The trial court gave an appropriate limiting instruction. In addition, the verdict demonstrates that the jury did not give the other acts evidence undue or preemptive weight. The prosecutor introduced the other acts evidence to establish the element of intent to murder. In light of the fact that the jury found defendant guilty of the lesser charge of assault with a dangerous weapon, we conclude that this evidence had little, if any, impact on the verdict. *Id.* at 399. See also *People v Gearn*s, 457 Mich 170, 207; 577 NW2d 422 (1998).

II

Defendant next argues that the trial court abused its discretion in fashioning his sentences. Defendant contends both that the court erroneously believed that due to his habitual offender status imposition of the maximum sentences was mandatory, and that the sentences were disproportionate. Habitual offender sentencing is reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). An abuse of discretion will be found where the sentencing court violates the principle of proportionality, which requires sentences imposed by the court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Where a sentencing court fails to exercise its discretion, and imposes sentence under the mistaken belief that enhancement is mandatory, a defendant is entitled to resentencing. *People v Green*, 205 Mich App 342, 347; 517 NW2d 782 (1994).

The record demonstrates that the sentencing court gave thorough consideration to the circumstances surrounding the offense and the offender. See MCR 6.425(D)(2)(e). Noting that it had not simply "come in . . . prepared to hand out the maximum that [it] *could* hand out [emphasis added]," and indicating that it believed the circumstances justified the maximum sentence imposed, the sentencing court clearly labored under no misconception of the law.

The sentences were within the limits authorized by the Legislature for an habitual offender third offense, under MCL 769.11; MSA 28.1083. Given defendant's criminal history demonstrating an inability to conform his conduct to the law, we hold that defendant's sentences

are proportionate. See *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). There was no abuse of discretion. *Cervantes, supra*.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Henry William Saad

/s/ Robert B. Burns